VOON NAM KWONG & ANOR *a*

v.

SELAMAT MAJU JAYA SDN BHD

HIGH COURT SABAH & SARAWAK, MIRI *b*
SULAIMAN DAUD JC
[SUIT NO: 22-87-2000(MR)]
4 FEBRUARY 2002

CIVIL PROCEDURE: *Default judgment - Setting aside - Judgment in default of defence to counterclaim - Rules of the High Court 1980, O. 19 r. 8 - Irregularity - Whether application to set aside irregular - Whether irregularity curable - Rules of the High Court 1980, O. 2 r. 1(2)* *c*

CIVIL PROCEDURE: *Pleadings - Striking out defence and counterclaim - Rules of the High Court 1980, O. 18 r. 19 - Defence and counterclaim - Late service - Whether counterclaim rendered irregular due to irregular defence - Whether default judgment irregularly obtained - Whether to be set aside ex debito justitiae - Whether time to be extended* *d*

The plaintiffs and the defendant entered into a development agreement in relation to a piece of land. The plaintiffs issued a writ against the defendant for the removal of a power of attorney and caveat. When the latter did not enter defence, the plaintiffs applied for an interlocutory judgment. Subsequently, the defendant served its defence and counterclaim to the plaintiffs whereupon the plaintiffs withdrew the application. However, they did not enter defence to the defendant's counterclaim. The defendant entered a default judgment against the plaintiffs. *e* *f*

Before this court, the plaintiffs applied (encl. 25) under O. 19 r. 8 of Rules of the High Court 1980 ('RHC') to set aside the default judgment on three grounds. Firstly, that the said judgment was entered based on a defence and counterclaim which had been served out of time without the leave of the court. Secondly, that the draft judgment had not been served to the plaintiffs' counsel for approval. And thirdly, that the default judgment was in breach of O. 42 r. 12 of the RHC. The plaintiffs additionally applied (encl. 35) under O. 18 r. 19 of the RHC to strike off the defendant's defence and counterclaim on the premise that they were filed out of time. *g* *h*

In relation to encl. 25, the defendant raised a preliminary objection in that O. 19 r. 8 of the RHC does not provide for the setting aside of a default judgment and prayed that encl. 25 should be set aside on this ground alone. *i*

Held:

[1] Order 19 r. 8 of the RHC merely provides for the default of defence to counterclaim and the application of rr. 2-7 thereof in respect of such default. They do not grant the court the power to set aside a judgment entered in default of defence. However, the citing of a wrong intitulement in a pleading, including summons, only rendered the summons to be irregular but could be cured by the court under O. 2 r. 1(2) of the RHC. Thus, the defendant's preliminary objection was dismissed. (p 457 e-f)

[2] The filing of defence is regulated by O. 18 r. 2 of the RHC. Notwithstanding the period prescribed thereunder, O. 3 r. 5 empowers the court to extend the time period on application. As the defendant had in fact failed to serve the defence within the prescribed period, such non-compliance rendered the defence to be irregular. (p 460 b-e)

[3] A counterclaim is regarded as a separate action, and not merely a defence to a plaintiff's claim. Even though a counterclaim is to be treated as a separate action, it still forms an integral part of a pleading, being a defence to the present suit. As the said counterclaim was embodied and formed an integral part of defence, the right of action therein could only be effected by service of defence. Accordingly, any irregularity in the service of the defence would also render the service of the counterclaim added thereto as being irregular. (p 460 h)

[4] The word "counterclaim" in the Rules of the High Court 1980, including those appearing in O. 19 r. 8 must be taken to mean a "regular counterclaim", ie, a counterclaim which is regularly served in accordance with the Rules, and not otherwise. Since the counterclaim in the present suit was irregular, the provisions of O. 19 r. 8 have no application thereto. It follows that the default judgment entered by the defendant against the plaintiff was irregular. The plaintiffs' application to set aside the default judgment was allowed as it was made within a reasonable time. (p 461 f-g)

[5] Applying the decision in *Hasil Bumi Perumahan*, there was no statutory obligation on the part of the solicitors to file a draft judgment which is only required under O. 42 r. 8 of the RHC. As the counterclaim concerned liquidated damages, the provisions of O. 19 r. 2 of the RHC would be applicable thereto. (p 462 c-f)

[6] Order 42 r. 12 of the RHC only provides for payment of interest from the date of judgment until the judgment is satisfied. The defendant had not expressly pleaded in the counterclaim as to when the cause of action in respect of the claim arose for the purpose of computing the period for which the pre-judgment interest was payable. Therefore, the inclusion in

the judgment of the interest at the rate of 8% per annum from the relevant date had no legal basis and has the effect of rendering the default judgment irregular. The default judgment could also be set aside *ex debito justitiae* on this ground. (pp 462 g & 463 a)

[7] As to the plaintiffs' application under encl. 35, the defendant had neither applied for an extension of time to file the defence and counterclaim nor obtained the plaintiffs' consent to file out of time. Thus, this court was unable to exercise its discretion for extension of time under its inherent jurisdiction or under O. 3 r. 5(1) of the RHC. (p 464 c-d)

[Plaintiffs' application under encl. 25 granted with costs. Defendant ordered to file application for time extension within stipulated period. Plaintiffs' application under encl. 35 awarded with costs.]

Case(s) referred to:

Cheow Chew Khoon (t/a) Cathay Hotel v. Abdul Johari Abdul Rahman [1995] 4 CLJ 127 ***(refd)***

Hasil Bumi Perumahan Sdn Bhd & Ors v. United Banking Corp Bhd [1994] 1 CLJ 329 ***(foll)***

Idris Hj Salleh v. Federal Auto Holdings Bhd [1979] 2 MLJ 141 ***(refd)***

Lai Yoke Ngan v. Chin Teck Kwee [1997] 3 CLJ 305 ***(refd)***

Metrojaya Bhd & Anor v. BTC Clothier Sdn Bhd & Anor [1996] 5 MLJ 445 ***(refd)***

MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun & Other Appeals [1996] 5 MLJ 45 ***(refd)***

Ong Guan Teck & Ors v. Hijjas [1982] CLJ 31; [1982] CLJ (Rep) 616 ***(refd)***

Tuan Hj Ahmed Abdul Rahman v. Arab Malaysian Finance Berhad [1996] 1 CLJ 241 ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 11

Rules of the High Court 1980, O. 2 r. 1(2), O. 3 r. 5(3), O. 15 r. 2(1), (3), O. 18 rr. 2, 19, O. 19 rr. 2, 3, 4, 5, 6, 7, 8, O. 42 rr. 8, 12

For the plaintiffs - Wendel Crocker; M/s Ting & Goh
For the defendant - Merlyn Toh; M/s Bong & Co

Reported by M Maheswaran

JUDGMENT

Sulaiman Daud JC:

There were two separate applications by the plaintiffs that came up for hearing before me. The application in encl. 25 is to set aside a default judgment dated 21 June 2001 entered by the defendant against them and that in encl. 35 seeks to strike out the defendant's defence and counterclaim. It was agreed between the parties that these two application be heard together.

The facts that led to these two applications are as follows. The plaintiffs took out a writ against the defendant for the removal of a power of attorney and caveat in respect of a piece of land which was the subject of a development agreement entered between them. The writ was duly served on the defendant's advocate on 9 November 2000. On 14 November 2000 the defendant served their memorandum of appearance but no defence was served within the fourteen days' period as required under O. 18 r. 2 of the RHC 1980. Subsequently on 14 December 2000 the plaintiffs filed an application under O. 19 r. 3 to enter an interlocutory judgment which was served on the defendant on 19 January 2001.

However before the hearing of the application, the defendant on 22 January 2001 served its defence and counterclaim to the plaintiffs' advocate. In the counterclaim the defendant claimed from the plaintiffs a total sum of RM621,614.88 in respect of the various expenses alleged to have been expended by them in connection with the development agreement (see para. 11 of the counterclaim). With the filing of the defence, the plaintiffs withdrew their application to enter the default judgment when it came up for hearing before me on 9 May 2001. However they did not enter their defence to the defendant's counterclaim. On 21 June 2001 the defendant entered default judgment against the plaintiffs on the following terms:

> No Defence To Counterclaim having been entered by the 1st and 2nd plaintiff herein, IT IS THIS DAY ADJUDGED that the 1st and 2nd plaintiffs do jointly and severally pay the defendant:
>
> (a) judgment for the sum of RM621,614.88;
>
> (b) interest on the said sum of RM621,614.88 at the rate of 8% per annum from 4.2.1997 until the date of judgment and thereafter at the rate of 8% per annum until full an final payment;
>
> (c) costs.

Enclosure 25

I will firstly deal with the plaintiffs' application to set aside the default judgment entered on 21 June 2001. The plaintiffs' application was supported by the affidavit of Wendel Crocker affirmed on 1 August 2001 (encl. 25) and two affidavits in reply by Sim Fong Soon, the second defendant, dated 27 August 2001 (encl. 31) and 18 September 2001 (encl. 39). The defendant filed in three affidavits in opposition affirmed by Swen Sim Liang Khui on 11 August 2001 (encl. 29), on 3 September 2001 (encl. 33) and on 26 September 2001 (encl. 41).

Mr Wendal Crocker, on behalf of the plaintiffs, submited that the default judgment was irregular and was liable to be set aside *ex debito justitiae*. The grounds advanced by the learned counsel in support of the application can be

summarised as follows. First the default judgment was entered in respect of a defence and counterclaim which was served out of time without leave of the court. Secondly the draft judgment was not served to the plaintiffs' counsel for approval. Thirdly the default judgment is in breach of O. 42 r. 12 as it includes interest at the rate of 8% per annum from 4 February 1997 to the date of judgment.

Before I proceed further on the issues raised in respect of the default judgment I will first deal with the preliminary issues raised by Mr Bong Ah Loi, the learned counsel for the defendant, on the propriety of the intitulement of the summons in chambers before the court. It is his contention that O. 19 r. 8 under which the present summons is made does not provide for setting aside of a default judgment in default of defence. By reason thereof he submitted that the said summons is plainly embarassing and ought to be struck out on this ground alone. In support of his argument the learned counsel cited the case of *Cheow Chew Khoon (t/a) Cathay Hotel v. Abdul Johari bin Abdul Rahman* [1995] 4 CLJ 127 where it was held that an originating process requiring an intitulement must state, with sufficient particularity, either in its heading or in its body, the statute or rule of court under which the court is being moved, otherwise it would be an embarrassing pleading and liable to be struck out, unless sooner amended.

I fully agree with the learned defendant's counsel that O. 19 r. 8 merely provide for the default of defence to counterclaim and the application of r. 2 to r. 7 thereof in respect of such default. The said rules do not provide for the power of the court to set aside a judgment entered in default of defence. However in my view the citing of a wrong entitulement in a pleading, including summons, only renders the summons to be irregular which can be cured by the court in the exercise of its powers under O. 2 r. 1(2). With regard to the exercise of the court's discretion under the said order Gopal Sri Ram JCA in the case of *Lai Yoke Ngan v. Chin Teck Kwee* [1997] 3 CLJ 305 made the following observation at p. 319:

> The proper approach is for a court to accept that a breach of a rule of court renders the particular proceedings irregular with the power of the court to excuse the non-compliance. The powers, as in all matters calling for cruical discretion, is to be exercised judicially having regard to the substantial merit of the case and having particular regard to the interest of justice.

Based on the above observation, it is clear that the summons before the court is liable to be struck out by reason of the irregularity not as a matter of course but at the discretion of the court having regard to the merit of the case and interest of justice. However in the instant case it is obvious from the summons and the content of the supporting affidavits that the plaintiffs are seeking to set aside the default judgment entered on 21 June 2001 on the ground of

irregularity. From their affidavits in opposition, it is without doubt the defendant is fully aware of the reliefs sought by the plaintiffs under the summons and was not taken by surprise by the wrong entitulement so as to occasion any miscarriage of justice. For the reason aforesaid I hold that the irregularity complained of by the defendant is not such that which may lead to the striking out of the present summons.

Having dealt with the preliminary issues I now turn to consider the regularity of the judgment entered by the defendant against the plaintiffs.

Default Judgment Entered In Respect Of Counterclaim Served After Default

The fact leading to the entry of the default judgment by the defendant is not disputed. It is obvious that the defence and counterclaim was served after the expiry of the fourteen days' period prescribed by the rules without an order of the court for extension of time or the consent of the plaintiff. It is the contention of the learned counsel for the plaintiffs that by reason of such default the service of the defence and the counterclaim is irregular. He further submitted that since the service of the counterclaim is irregular the default judgment entered thereform is an irregular one and is liable to be set aside *ex debito justitiae*.

Mr Bong Ah Loi, on behalf of the defendant, did not dispute the late service. However the learned counsel contends that the plaintiffs are estopped from applying to set aside the default judgment on the ground of the late service when they had earlier withdrew the summons to enter default judgment against the defendant in default of defence. In support of his contention he cited the case of *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305. With respect as I understand it that case does not support the defendant's contention. In that case the plaintiffs issued a writ against the defendants for the several reliefs endorsed therein, including claim for damages. No statement of claim was served. On 28 November 1991 the plaintiffs applied for and obtained judgment which include an a order requiring the registrar to assess damages. Subsequently on 2 December 1991 the plaintiffs' solicitor entered a form of judgment in default in respect of all the relief claimed. On 28 January 1992 the defendants purported to enter appearance. Subsequently by summons dated 31 January and l April 1992 the defendant seek to set aside so much of the order which relate to the assessment of damages and to strike out the writ respectively. The plaintiffs argued, *inter alia*, that it was not open to the defendants, having encouraged the plaintiffs to believe that the action would not be contested, to challenge a judgment entered in the proceedings, however irregular the judgment might be.

With regard to the argument mounted on the doctrine of estoppel in that case Gopal Sri Ram JCA stated at p. 324 as follows:

> The answer to the complaint made by counsel lies in appreciating the true nature of the doctrine. As observed by Mohd Azmi FCJ during arguments, the doctrine is essentially equitable in nature. It is a rule by which justice is done according to the facts and circumstances of a particular case and its operation depends much upon the conduct of the parties. It is therefore extremely flexible in its application because it moulds itself to fit a particular fact pattern.

His lordship after considering several authorities related to the point in issue further stated at p. 328 as follows:

> Accordingly, the global question which a court must ask itself is this: is it just and equitable that the particular litigant (against whom the estoppel is raised) should succeed, given the totality of the facts and circumstances of the case? If the answer to that question is in the affirmative, the estoppel does not bite: if the answer is in the negative, then it does.

The reason for withdrawing the summons to enter judgment in default against the defendant has in my opinion been satisfactorily explained in para. 13 of the affidavit of Wendel Crocker (encl. 25) filed in support of this application, and is as follows:

> 13. That on the hearing date of 14 the day of February 2001, I did withdraw the said application for interlocutory judgment on the basis that since the defence was subsequently filed out of time, the plaintiffs application for interlocutory judgment on the grounds of no defence being filed, did not reflect the current status of the proceedings and the plaintiffs would instead apply to strike out the defence since it is on record.

It is to be noted that from the record the withdrawal of the summons was not made on 14 February 2001 but on 9 May 2001 when the case came up for hearing before me. However in my view such an error is not material so as to effect the validity of the explanation. It is trite law that if before the judgment is entered, the defendant serves a defence even though it be out of time, a judgment in default cannot be entered (see *Hasil Bumi Perumahan Sdn Bhd & Ors v. United Banking Corp Bhd* [1994] 1 CLJ 329, *Metrojaya Bhd & Anor v. BTC Clothier Sdn Bhd & Anor* [1996] 5 MLJ 445). It will be a futile attempt for the plaintiffs to proceed with the summons to enter the judgment in default of defence after the service thereof. The plaintiffs have therefore rightly withdrew the summons to enter the default judgment against the defendant as any order given in respect thereof is liable to be set aside with costs. For the reason aforesaid it does not appear to me that the plaintiffs have by their conduct consented to the late filing of the defence and counterclaim so as to invoke this doctrine of estoppel against them.

I now turn to consider the argument on the regularity of the judgment. The first question to be answered is whether the service of defence and counterclaim out of time without an order for extension of time or consent of the opposite party is a regular service.

The filing of defence is regulated by O. 18 r. 2 of the RHC which reads as follows:

> (1) Subject to paragraph (2), a defendant who enters an appearance in, and intends to defend, an action must, unless the Court gives leave to the contrary, serve a defence on the plaintiff before the expiration of 14 days after the time limited for appearing or after the statement of claim is served on him, whichever is the later.

Notwithstanding the period prescribed by the aforesaid rule for the filing of a defence, O. 3 r. 5 provides for the discretionary power of the court to extend such to time on application. Such time may also be extended by consent of the party to whom the defence is to be served (see O. 3 r. 5(3). The language of these rules are clear and equivocal. In the present case it is obvious that the defendant's failure to serve the defence within the time prescribed without taking out a time summons for extension of time amount to non-compliance of the rules. Such non-compliance will in my view render the defence filed by the defendant to be irregular.

In the present case the plaintiffs seeks to strike out the judgment in default in respect of the counterclaim added to the defence in question. The question is whether such counterclaim is also irregular by reason of the irregular defence. To answer the question it will be necessary to examine the rules relating to counterclaim. Order 15 r. 2(1) allows a defendant in any action who alleges that he has a claim or is entitled to any relief or remedy against a plaintiff in the action in respect of any matter to make a counterclaim in respect of that matter; and where he does so he must add the counterclaim to the defence. Order 15 r. 2(3) provide that a counterclaim may be proceeded with notwithstanding that judgment is given for the plaintiff in the action or that the action is stayed, discontinued or dismissed. Under O. 19 r. 8 a defendant counterclaiming against a plaintiff may enter, or apply by summons for, judgment in default of defence to the counterclaim.

It is well established that a counterclaim is regarded as a separate action not merely a defence to the plaintiff's claim. Even though a counterclaim is to be treated as a separate action it still forms an integral part of a pleading, being a defence in the present suit. For convenience the counterclaim in the present case in so far as relevant reads as follows:

COUNTERCLAIM

9. The defendant repeats paragraphs 1 to 6 of the defence.

10. The defendant avers that pursuant to the development agreement, the defendant has paid, on behalf of the plaintiffs, the redemption sum due for the said land from the chargor, Hock Hua Bank Berhad.

11. The defendant further avers that in addition to the redemption sum, the defendant has also spent diverse sums for the application including architect and consultant fees and other relevant expenses. The total sum expended is RM621,614.88

(Particulars of expenses)

12. In breach of the development agreement, the plaintiffs had refused to allow the defendant to proceed with the development of the said land.

13. In the premise the defendant has suffered loss and damages.
(Prayers as set out)

It as apparent from the above extract, the counterclaim is not only added to the defence but also incorporated, by reference, certain averments in the defence. Since the counterclaim in the present suit is embodied and form an integral part of the defence, the right of action therein can only be effected by the service of the defence. Any irregularity in the service of a defence will also in my view render the service of the counterclaim added thereto to be irregular. It will necessarily follow that a counterclaim which was irregularly served is also an irregular counterclaim.

In my view reference to "counterclaim" in the RHC 1980, including those appearing in O. 19 r. 8 must mean a "regular counterclaim", that is a counterclaim which is regularly served in accordance with the rules. It cannot be construed as including an irregular counterclaim. In other words a default judgment can only be entered in respect of default of defence to a regular counterclaim. Since the counterclaim in the present suit is an irregular one the provisions of O. 19 r. 8 has no application thereto. Therefore in my view the default judgment entered by the defendant against the plaintiffs which is based on an irregular counterclaim is irregular.

The procedure for setting aside a default judgment has been authoritatively stated in *Tuan Hj Ahmed Abdul Rahman v. Arab Malaysian Finance Berhad* [1996] 1 CLJ 241 where Edgar Joseph FCJ said at p. 247:

> It is elementary that an irregular judgment is one which has been entered otherwise than in strict compliance with the rules or some statutes or is entered as a result of some impropriety which is considered to be so serious as to render the proceedings a nullity.

> The general rule is that when it is clearly demonstrated to the satisfaction of the court that a judgment has not been properly obtained, the defendant is entitled to have it set aside *ex debito justitiae*, that is to say irrespective of the merits and without terms. Having said that it should be added that the application to set aside the judgment should be made within reasonable promptitude, in other words within reasonable time and before the defendant has taken a fresh step after knowing of the irregularity.

In the present application it is obvious that the plaintiffs, against whom the default judgment is entered, made the application to set aside the same within a reasonable time. I will allow the plaintiffs' application to set aside the default judgment on the aforesaid ground alone.

The question for determination on the second ground is whether there is a requirement for the draft judgment entered by the defendant under O. 19 to be sent to the plaintiffs' counsel for approval. The learned counsel for the plaintiffs submitted that there is no such requirement and in support he cited, among others, the case *Hasil Bumi Perumahan Sdn Bhd & Ors v. United Malayan Banking Corp Bhd* [1994] 1 CLJ 329 where Jemuri Serjan CJ (Borneo) in delivering the decision of the Supreme Court observed that in a case under O. 19 r. 3 there is no statutory obligation on the part of the solicitors to file a draft judgment which is only required under O. 42 r. 8.

In the present case the judgment was entered in default of defence to counterclaim under O. 19 r. 8. Since the counterclaim is in respect of liquidated damages the provisions of r. 2 of the said O. 19 shall apply thereto. It is obvious to me that the observation made in the *Hasil Bumi Perumahan* case shall also apply to cases where judgment is entered under O. 19 r. 2. I therefore agree with the defendant's counsel on this issue.

I next consider the third issue whether the judgment is in breach of O. 42 r. 12 as it includes interest of 8% per annum from the date of filing the writ (4 February 1997) until the date of judgment.

It is clear that O. 42 r. 12 only provide for payment of interest from the date of judgment until the judgment is satisfied. However the payment of interest before judgment is clearly provided under s. 11 of the Civil Law Act 1956 which reads:

> In any proceeding tried in any court for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of judgment.

In the defendant's counterclaim it is obvious that the total sum of RM621,614.88 as prayed under para. 13 is the aggregate sum of the various expenses incurred by the defendant in respect of the aborted development agreement. However it is not expressly pleaded in the counterclaim when the cause of action in respect of such claim arose for the purpose of computing the period for which the pre-judgment interest is payable. It was also not expressly pleaded that the said pre-judgment interest is being made under the said s. 11 of the Civil Law Act 1956. In the absence of such averment in my view the inclusion in the judgment of the interest at the rate of 8% per annum from 4 February 1997 has no legal basis and has the effect of rendering the default judgment to be irregular. The default judgment can also be set aside *ex debito justitiae* on this ground.

For all the reason aforesaid I make an order in terms of the summons in encl. 25, that the judgment in default dated 21 June 2001 entered by the defendant against the plaintiffs be set aside with costs.

Enclosure 35

By encl. 35 the plaintiffs sought to strike out under O. 18 r. 19 of the RHC the defendants' defence and counterclaim and prayed for judgment to be entered against the defendant. It is the plaintiffs' contention that the defence and counterclaim which were filed out of time is prejudicial, embarassing and will delay the fair trial of this action and an abuse of the process of the court and as such ought to be struck out. It is to be noted that I have earlier in the application under encl. 25 made the finding that the defence and counterclaim, including the service thereof, to be irregular as they were filed outside the prescribed time without leave of the court or consent of the plaintiffs.

The further question to be answered is whether such defence and counterclaim can be set aside by reason of such irregularity. The law on the entry of default judgment in respect of defence served after expiration of the prescribed time is well settled. Such defence cannot be disregarded and will generally prevent the plaintiff from entering judgment. (see *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun & Other Appeals* [1996] 5 MLJ 45, *Idris bin Hj Salleh v. Federal Auto Holdings Bhd* [1979] 2 MLJ 141). However such principles will not in my view have application to the setting aside of an irregular defence and counterclaim by reason of irregular service.

The discretion of the court to set aside for such an irregularity is provided in O. 2 r. 1(2). Under the said rule the court may, among others, set aside any steps taken in the proceedings or any document to which the irregularities relate or to make such order dealing with the proceedings generally as it thinks fit. It is clear in the present case that the defence and counterclaim has been filed and cannot be disregarded by the court. On the other hand the defence

and the counterclaim filed by the defendant will continue to be irregular unless otherwise ordered by the court under O. 2 r. 1(2) or in the exercise of its inherent jurisdiction.

It is apparent that the court has an unfettered discretion to remedy the irregularity by granting an extension of time. In *Ong Guan Teck & Ors v. Hijjas* [1982] CLJ 31; [1982] CLJ (Rep) 616, Hashim Yeop A Sani J (as he then was) observed that 'the rules of the court must *prime facie* be obeyed and in order to justify an extension of time, there must be some material on which the court can exercise its discretion in favour of the applicant. For otherwise the party in breach of the rules would have unfettered right to extension of time which would defeat the very purpose and object of the rules of limitation of period'.

In the present case there was no application made by the defendant for extension of time to file the defence and counterclaim or to obtain the consent of the plaintiffs to file out of time. There is no material before the court to enable the court to exercise its discretion for extension of time under its inherent jurisdiction or under O. 3 r. 5(1). Having considered that the defence and counterclaim have already been filed and having regard to the interest of justice, I make an order for the defendant to make the application for extension of time to serve the defence and counterclaim to the plaintiffs within fourteen days from the date of this order, failing which judgment will be entered in terms of the summons in chambers in encl. 35 commencing immediately after the expiry of the said fourteen-day period. In making this order I also award the plaintiff with costs.